February which may have only 29 or 28 days. The wages or salary is of the same amount irrespective of whether there are the same number of working days in January as in any other month. In other words, the number of working days in the month is not relevant. For every purpose, the concept that for monthly pay the number of working days in the month is irrelevant should be adopted unless it is clear from the provisions of the law that for a particular purpose it is intended that a different treatment should be given. In conformity with this concept, the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages with the total number of days in that month. This method seems to be consistent with the term "average true day's wages' contained in regulation 6(2).

It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

In *Keast* v. *The Barrow Hematite Steel Company*[3] a workman brought a claim against his employer for compensation under the Workmen's Compensation Act 1897. Under The first Schedule to the Act, the compensation in respect of the period of incapacity was to be computed on certain percentage of the "average weekly earnings". For the employer, it was contended that the true method of arriving at the "average weekly earnings", within the meaning of the First Schedule to the Act, was to take the total amount the workman had earned during the previous twelve months – that was to say, if he had been so long employed – and divide that amount by 52, the number of weeks in the year. The contention on the part of the workman was that, in making the calculation, those weeks or days in weeks during which the workman had not been actually employed ought to be excluded, and that, therefore, where he had not been working continuously throughout the whole year, the divisor ought not to be 52, but some lower number. It was held by the Court of Appeal that the total amount of the year's earnings ought to have been divided by 52, and not by any less number excluding the weeks when the workman was not at work.

In my judgment, the decision of the High Court is correct. This appeal should be dismissed.

Appeal dismissed.

Solicitors: *Nijar & Nijar; Shook Lin & Bok.*

YAU SUN FATT v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C. JJ.) October 13 and November 30, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 62 of 1985]

Criminal Procedure – Trial by jury – Admissibility of cautioned statement – Trial within trial – Judge ruling that cautioned statement is admissible – Evidence heard by jury to decide on weight to be given to cautioned statement – Application for accused to give evidence on cautioned statement – Application refused by trial judge – Accused deprived of fair trial – Criminal Procedure Code, s. 214.

In this case, on a trial of two charges of murder against the accused, the prosecution sought to put in a cautioned statement made by the accused while in police custody. On objection taken by the defence, the learned judge held a trial within a trial in the absence of the jury to determine the admissibility of the cautioned statement. After the learned judge had ruled that it was admissible, the jury then heard substantially the same evidence from the prosecution witnesses to decide on the weight to be given to the cautioned statement. The defence applied for the accused to give evidence.

It was contended that the accused was entitled to do so at that stage and did not have to wait until the defence was called. The learned trial judge, after hearing the prosecution, disagreed with the contention of the defence. The accused then elected to remain silent after the close of the prosecution case and he was convicted. He appealed to the Supreme Court.

Held: (1) in this case, the learned judge had ruled the cautioned statement to be admissible, so there is no reason why the same evidence could not be repeated in the presence of the jury, especially since the accused decided to remain silent when called for his defence;

2) the accused should have been allowed to give his evidence on the cautioned statement at that stage and cannot be denied his right to have his evidence repeated in the presence of the jury;

3) after the learned judge had ruled on the admissibility and the cautioned statement was admitted, the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned judge alone to testify again in the presence of the jury and that

would include the accused. The procedure would mean that the accused would not have to wait until the defence is called, particularly when the accused chose to remain silent;

4) as the accused chose to remain silent after the close of the prosecution case, the failure to allow him to repeat his allegations in the presence of the jury had deprived him of a fair trial. A cautioned statement may sometimes be the mainstay of the case for the prosecution and the opportunity to repeat his allegations to the jury before the close of the prosecution case is the proper and indeed the fairest way of enabling the jury as sole judge of fact to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by section 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution;

5) the appeal must be allowed and the conviction and sentence set aside and a retrial ordered.

Cases referred to:

(1) *Yaacob* v. *Public Prosecutor* [1966] 1 M.L.J. 67.
(2) *R.* v. *Francis and Murphy* 43 Cr. App. R. 174, 176.
(3) *R.* v. *Chadwick* 24 Cr. App. R. 138.
(4) *R.* v. *Murray* 34 Cr. App. R. 203, 207.
(5) *Chan Wai-Keung* v. *Reg* [1967] 1 All E.R. 948, 953.
(6) *Basto* v. *Reg.* [1954] 91 C.L.R. 628.

SUPREME COURT.

Karpal Singh for the appellant.

Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the court): We allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial. As the issue is of great importance, we consider that we ought to give a written judgment. Shortly, the issue relates to the manner the evidence given before a judge sitting alone in a trial within a trial pertaining to the admissibility of a cautioned statement may be repeated in the presence of the jury to enable the jury to decide on the weight to be attached to the cautioned statement.

During the trial of two charges of murder against the accused, the prosecution sought to put in a cautioned statement made by the accused while in police custody. On objection being taken by the defence to the admissibility of the cautioned statement, the learned judge conducted a trial within a trial in the absence of the jury to determine the admissibility of the cautioned statement. After the learned judge had ruled that it was admissible, the jury then heard substantially the same evidence from the prosecution witnesses to decide on the weight to be given to the cautioned statement. On the authority of *Yaacob* v. *Public Prosecutor,*[1] the defence applied for the accused to give evidence on the cautioned statement. It was contended that the accused was entitled to do so at that stage and does not have to wait until the defence was called. The reason was that the accused might, as it happened here, wish to remain silent in which case he would have lost the opportunity to give evidence on the cautioned statement. On the other hand, the prosecution submitted that although the jury had the right at that stage to hear the prosecution witnesses who gave evidence at the trial within the trial, they could not hear the accused. He took the view that the accused could do so when he gave his evidence in his defence.

In *Yaacob* v. *Public Prosecutor,*[1] after ruling that a confession was admissible the jury was recalled. The confession was then produced and admitted and read. The defence then asked to be allowed to call the accused to give evidence regarding the making of the confession but this application was refused. In his summing up, the judge told the jury that he had admitted the confession because he was fully satisfied that it was made voluntarily. The jury were not told that they were entitled to their opinion of the way in which the confession had been obtained. In allowing the appeal, the Federal Court held, *inter alia,* that although the question of admissibility of evidence is for the judge and not the jury to decide, the question whether a statement is free and voluntary is a question of fact and must be decided on the evidence tendered by the prosecution and, if any, tendered by the accused.

In delivering the judgment of the court, Thomson L.P. referred to the case of *R.* v. *Francis and Murphy*[2] where Parker L.C.J. stated:

"It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) Ed. of *Archbold's Criminal Pleadings,* etc., at paras. 1114 and 1115. 'The proper course', it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear

that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession."

Thomson L.P. went on to state:

"From the proposition that the accused person is entitled to have the verdict of the jury on the weight and value of the confession it clearly follows that if the confession is admitted the jury should hear the evidence which thitherto the judge alone has heard. Then counsel for the defence should be allowed to cross-examine the prosecution witnesses over again in the presence of the jury *and in due course, if so desired, to call the prisoner to repeat his evidence.*" (words italicised for emphasis)

The defence contended that the italicised words meant that if he so desired, the accused would be allowed to repeat in the presence of the jury before the close of the prosecution case the evidence he gave earlier before the judge alone. One reason why the accused should be allowed to repeat his evidence in connection with the cautioned statement after the judge has ruled it to be admissible is because in the event that the accused decides to remain silent then the jury would have heard his evidence.

The learned judge disagreed with the contention of the defence. It is not in dispute that a trial within a trial is a completely separate trial purely to determine admissibility, as the question of admissibility is for the judge alone. It would, of course, be convenient and time-saving to allow the jury to sit with the judge to hear the evidence in a trial within a trial. However, this would be contrary to practice. (See *R.* v. *Chadwick.*)[3] Also, if the judge ruled against admissibility, the jury would have heard evidence which they should not have been allowed to hear.

In this case, the learned judge had ruled the cautioned statement to be admissible so that we see no reason why the same evidence could not be repeated in the presence of the jury, especially since the accused decided to remain silent when called to give his defence. It may be tedious, inconvenient and time-consuming but the accused cannot be denied his right to have his evidence repeated in the presence of the jury. We consider that the accused should be allowed to give his evidence on the cautioned statement at that stage. The learned judge never gave him that option as the learned judge took the view that the words "in due course" meant that the accused could elect to give evidence in his defence and could repeat his allegations. The learned judge said in his ruling at p. 119 of the appeal record:

"... Of course if he elects to remain silent he would have lost the opportunity to repeat the allegations but that does not mean that the jury, in considering the weight to be attached to the statement, would not be directed to consider the allegations."

How could this be possible if the accused chose to remain silent when called for his defence, as the jury would not have heard his allegations. If the weight and value of the cautioned statement were matters for the jury, then it is only right that they should be allowed to hear the allegations of the accused. The accused must be given the opportunity to be heard by the jury before being called upon to enter into his defence. As Lord Goddard said in *R.* v. *Murray*[4] concerning the confession:

"Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained."

The truth of the confession is not directly relevant at the *voir dire,* but it will be a crucial question for the jury once the judge admits it.

With the greatest respect, we are unable to agree with the learned judge's interpretation of *Yaacob* v. *Public Prosecutor*[1] as set out in his ruling. We consider that after the learned judge had ruled on the admissibility and the cautioned statement was admitted, the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused need not have to wait until the defence is called, particularly when the accused chose to remain silent.

We find support in our view from the decision of *Chan Wai-Keung* v. *Reginam*[5] where Lord Hodson referred to a statement by the High Court of Australia in the case of *Basto* v. *Reginam:*[6]

"... Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on a *voir dire* for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary ...".

As the accused chose to remain silent after the close of the prosecution case, the failure to

allow him to repeat his allegations in the presence of the jury has deprived him of a fair trial. A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution case is the proper and indeed the fairest way of enabling the latter, as sole judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by section 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, we consider that a conviction so arrived could not stand. Therefore, we allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

LORENSUS TUKAN v. PUBLIC PROSECUTOR

[S.C. (Seah, Mohamed Azmi & Wan Hamzah S.C. JJ.) October 17, 1985 & November 10, 1987]

[Kota Kinabalu – Supreme Court Criminal Appeal No. 21 of 1985]

Criminal Law – Penal Code, s. 300 Exception 1 – Murder – Defence of grave and sudden provocation – Question of law or of fact – Test of reasonable man belonging to the same society as accused – Penal Code, s. 300, Exception 1.

Criminal Procedure – Trial with the aid of assessors – Charge of murder – Defence of grave and sudden provocation – Whether question of law or of fact – Judge disagreeing with one of assessors – No reasons given for such disagreement – Misdirection – Failure of justice – Conviction of murder set aside and substituted with conviction for culpable homicide – Criminal Procedure Code (F.M.S. Cap. 6), s. 198.

The appellant, an Indonesian/Timorese, was charged with murder. The appellant in a confession to a magistrate admitted the killing but appeared to rely on the defence of grave and sudden provocation. The trial was held before a judge with the aid of assessors. The learned trial judge summed up to the assessors and in his summing-up he stated that whether the provocation was grave and sudden in order to deprive a reasonable man of his power of self-control is a question of fact to be decided by the assessors. One of the assessors stated that the accused was not deprived of his self-control by grave and sudden provocation when he did the act but the second assessor, who was a Timorese, was of the opinion that the accused had lost his self-control because of the grave and sudden provocation. The learned trial judge agreed with the first assessor but disagreed with the second assessor. He, however, gave no reasons for so doing. He convicted the appellant of murder. The appellant appealed.

Held: (1) in this case the learned judge seemed on the one hand to direct the assessors that whether the provocation was grave and sudden enough to deprive a reasonable man and the appellant of his power of self-control so as to reduce the offence from murder to culpable homicide not amounting to murder was a question of fact to be decided by them. On the other hand, the learned judge appeared to have determined the matter himself not as a question of fact but as a question of law. This was a serious misdirection;

(2) the learned judge committed a material error of law when he so decided as a matter of law whether there was grave and sudden provocation at the time of the commission of the offence charged which according to law was to be deemed a question of fact:

(3) the learned judge seriously misdirected himself in not adopting the test of a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, when he considered the defence of provocation in accordance with Exception 1 to section 300 of the Penal Code;

(4) the learned judge had not properly stated his reasons for rejecting the opinion of the second assessor pursuant to section 198 of the Criminal Procedure Code. *A fortiori* when the second assessor belongs to the same race as the appellant;

(5) taking all these grave misdirections together, it is impossible to say what verdict or judgment the learned judge would have given had he properly directed himself on the law. In the circumstances, it would not be safe to allow the conviction for murder to stand and the conviction for murder should be set aside and a conviction for culpable homicide not amounting to murder substituted for it.

Cases referred to:

(1) *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588.
(2) *Phillips* v. *The Queen* [1969] 2 A.C. 130.
(3) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.
(4) *Othman Mat* v. *Public Prosecutor* [1964] M.L.J. 118.
(5) *Kuan Ted Fatt* v. *Public Prosecutor* [1985] 1 M.L.J. 211.
(6) *Kwaku Mensah* v. *The King* [1946] A.C. 83, 92.
(7) *Nanavati* v. *State of Maharashtra* A.I.R. 1962 S.C. 605, 530.
(8) *Ramanugrah Singh* v. *Emperor* A.I.R. 1946 P.C. 151, 153.
(9) *Prasad* v. *The Queen* [1981] 1 All E.R. 319.
(10) *Mahlikilili* v. *The King* A.I.R. 1943 P.C. 4, 7.
(11) *Abdul Rahim* v. *King-Emperor* (1945-46) 73 I.A. 77.
(12) *Elahee Buksh* 5 Suth. W.R. 80.